

## Fee Waiver Request

### Records of EPA Records of Communications and/or Meetings Between GenOn Energy, Inc. and EPA

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(4)(A)(iii), and EPA's implementing regulations, 40 C.F.R. § 2.107(l), the Environmental Integrity Project (EIP) requests that all charges (e.g., search, review, and duplication fees) incurred in connection with this FOIA request be waived.

FOIA is intended to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). FOIA requires agencies to waive or reduce fees for requests "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).

"[A]ll public interest groups . . . will be able to qualify for fee waivers and thereby obtain documents without charge if their requests meet the standard for waivers." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. 29,696 (1986) (statement of Rep. English)). Congress intended the fee waiver provision to be "liberally construed in favor of waivers for noncommercial requesters." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (quoting 132 Cong. Rec. 27,190 (1986) (statement of Sen. Leahy)).

Fee waivers requests must be made with "reasonable specificity" and based on more than "conclusory allegations." *Id.* (quoting *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (per curiam); *Nat'l Treasury Employees Union v. Griffin*, 811 F.2d 644, 647 (D.C. Cir. 1987)). But FOIA does not require "pointless specificity." *Id.* at 1314.

As discussed below, EIP satisfies the two-pronged test for a fee waiver established in FOIA and outlined in EPA's implementing regulations because: (i) "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government," and (ii) disclosure of the information "is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1).

#### **I. Disclosure of the requested information is in the public interest because it will contribute significantly to public understanding of the operations or activities of government.**

EIP qualifies for the fee waiver because the requested information will "contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. § 2.107(l)(1), (2). Specifically, EIP meets each of the four factors that EPA considers with respect to the "public understanding" prong.

**A. The subject of the requested records concerns the operations or activities of the government, and the informative value of this information is high**

Under factors (l)(2)(i) and (l)(2)(ii), EPA considers **“Whether the subject of the requested records concerns ‘the operations or activities of the government’”** and **“[t]he informative value of the information to be disclosed.”** 40 C.F.R. § 2.107(l)(2)(i), (ii).

The subject of the records EIP has requested clearly concerns the operations and activities of the government. EIP has requested records of communications and/or meetings between EPA and GenOn Energy, Inc., NRG Energy, Inc., GenOn Chalk Point, LLC, NRG Chalk Point, LLC, and/or GenOn Mid-Atlantic, LLC (collectively referred to as “GenOn”). Pursuant to the Clean Water Act, EPA is responsible for reviewing, and if appropriate, revising nationally applicable effluent limitation guidelines (ELGs) for the steam electric power generating point source category under 40 C.F.R. Part 423 (“Steam Electric ELGs”). These Steam Electric ELGs set the minimum standards for effluent limitations that must be incorporated into National Pollutant Elimination System (NPDES) permits issued by EPA or states, when delegated Clean Water Act authority. Having not revised the Steam Electric ELGs since 1982, EPA promulgated new ELGs for the steam electric industry on November 3, 2015. 80 Fed. Reg. 67,838, 67,838-903; 67,844 (Nov. 3, 2015). EPA then stayed the rule on April 25, 2017, 82 Fed. Reg. 19,005, withdrew that stay on September 18, 2017, and postponed the default compliance deadline for certain new limits to November 1, 2020. 82 Fed. Reg. 43,494, 43,496 (Sept. 18, 2017).

Meanwhile, GenOn is a company that operates steam electric generating stations, including three in Maryland, which are subject to the Steam Electric ELGs (Chalk Point Generating Station in Prince George’s County Dickerson Generating Station in Montgomery County, and Morgantown Generating Station in Charles County). GenOn and EPA have communicated and participated in meetings where EPA’s review of the Steam Electric ELGs has been referenced, as GenOn has conveyed to the Maryland Department of the Environment and Maryland state courts. The records requested referencing these communications and meetings pertain to the operations and activities of the government through EPA’s responsibility in issuing these nationwide ELGs for coal plants and role in regulating and communicating with the industry subject to these standards. Therefore, the subject of the request clearly concerns “operations or activities” with a direct and clear connection to a government agency. 28 C.F.R. § 16.10(k)(2)(i).

The informative value of this information is very high, as it will provide the public with new factual information of a timely subject that has grave implications for public health and the environment. Specifically, there has been a great deal of media attention and public concern regarding EPA’s review of the 2015 Steam Electric ELG Rule. Further, there has been a great deal of media attention and public concern surrounding undisclosed communications between the EPA and regulated industries in recent years. This request seeks to add to the public understanding by seeking information on communications and meetings between EPA and the regulated industry over the Steam Electric ELG Rule, as any proposed weakening of the Steam

Electric ELGs will assuredly affect the environment, the public's concern for the environment, and negative consequences on public health.

**B. Disclosure of the requested records is likely to contribute significantly to public understanding of government operations or activities**

Under factors (1)(2)(iii) and (1)(2)(iv), EPA considers "The contribution to an understanding of the subject by the public is likely to result from disclosure" and "The significance of the contribution to public understanding." 40 C.F.R. § 2.107(1)(2)(iii), (iv).

As to factor (1)(2)(iii), considerations within this factor include the "requester's expertise in the subject area and ability and intention to effectively convey information to the public" and that the public understanding in question be that of "a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester." *Id.*

EIP has a long, demonstrated, and continuing history of expertise and contribution to the public understanding on a number of topics pertaining to governmental operations. In furtherance of this, EIP distributes information via regularly published reports and press releases, its frequently updated website (<http://www.environmentalintegrity.org>) and social media platforms (<https://twitter.com/EIPOnline>; <https://www.facebook.com/EnvIntegrity/>), communication with partner organizations and outside media outlets, and legal and administrative documents such as public comments on agency rulemakings and permits and briefs and documents filed in litigation. EIP intends to make the same dissemination in this instance. After reviewing the information provided in response to this FOIA request, EIP intends to use its resources and expertise to inform and educate the public, the media, and other nonprofit advocacy organizations as to the history of EPA's travel expenditures and EPA's recent communication with third parties regarding travel expenditures under previous Administrators.

Some recent examples of these types of dissemination include the following:

- On August 10, 2017, EIP published a report entitled "Environmental Enforcement Under President Trump," in which it detailed the decline in EPA's civil enforcement actions and penalties under the Trump Administration in 2017 versus years past. EIP based the report on records obtained from EPA, comparing consent decrees lodged between January and July 2017 to similar periods in other administrations. EIP posted the report and a press release to its website and conducted a press conference to raise awareness of the report. See EIP, *Environmental Enforcement Under Trump* (2017), available at <http://www.environmentalintegrity.org/wp-content/uploads/2017/08/Enforcement-Report.pdf>; Press Release, EIP, *Civil Penalties Against Polluters Drop 60 Percent So Far Under Trump* (Aug. 10, 2017), <http://www.environmentalintegrity.org/news/penalties-drop-under-trump/>.
- EIP published a follow-up report on this subject on February 15, 2018, in which it analyzed a full year of information as to EPA's environmental enforcement under the leadership of Administrator Scott Pruitt. See EIP, *Paying Less to Pollute: A Year of Environmental Enforcement Under the Trump Administration* (2018), available at

<http://www.environmentalintegrity.org/reports/paying-less-to-pollute/>.

- On December 7, 2017, EIP—on behalf of four partner nonprofit organizations in Texas and Louisiana—reviewed and provided public comments to the U.S. Department of Justice, in which EIP made an in-depth analysis of a consent decree between the United States and Exxon Mobil regarding Clean Air Act violations at the company’s chemical plants. *See* Comments of EIP et al. to Assistant Attorney General, U.S. Department of Justice (Dec. 7, 2017), *available at* <http://www.environmentalintegrity.org/wp-content/uploads/2017/02/ExxonMobilCDAnalysis.pdf>. On December 12, 2017, EIP made these comments available to the general public by posting them to its website along with a press release summarizing the issues that EIP and its partner groups raised. *See* Press Release, EIP, *Trump Administration’s Settlement with Exxon Mobil Appears to Require Less in Pollution Controls than Advertised* (Dec. 12, 2017), <http://www.environmentalintegrity.org/news/trump-administrations-settlement-with-exxon-mobil-appears-to-require-less-in-pollution-controls-than-advertised/>.
- On December 11, 2017, EIP published a report finding that while EPA’s Total Maximum Daily Load for the Chesapeake Bay has reduced nitrogen and phosphorous pollution, the Bay may be receiving much more nitrogen pollution than previously thought via “deposition” of ammonia released to the air. EIP based its analysis on EPA’s Total Maximum Daily Load for the Chesapeake Bay, the agency’s emissions factor for ammonia emissions from broiler chicken concentrated animal feeding operations (CAFOs), and monitoring data from the CAFOs. EIP posted the report to its website with an analysis summarizing the findings for the general public. *See* EIP, *Ammonia Emissions from Broiler Operations Higher than Previously Thought* (Dec. 2017), <http://www.environmentalintegrity.org/reports/ammonia-emissions/>.
- On July 7, 2017, EIP and its Texas partner organization Environment Texas issued a report entitled “Breakdowns in Enforcement,” in which the groups found that the State of Texas imposed penalties for a mere three percent of illegal air pollution releases between 2011 and 2016. *See* EIP & Env’t Texas, *Breakdowns in Enforcement: Texas Rarely Penalizes Industry for Illegal Air Pollution Released During Malfunctions and Maintenance* (July 2017), *available at* <http://www.environmentalintegrity.org/wp-content/uploads/2017/02/Breakdowns-in-Enforcement-Report.pdf>. The groups based their analysis on data obtained from the Texas Commission on Environmental Quality. EIP made the report publicly available by posting it to its website with a press release and publicized it through a telephonic press conference, which is also available on the website. *See* Press Release, EIP, *Texas Fails to Penalize 97 Percent of Illegal Air Pollution Releases* (July 7, 2017), <http://www.environmentalintegrity.org/news/texas-fails-to-penalize-97-percent-of-illegal-air-pollution-releases/>.
- On December 4, 2017, EIP filed a lawsuit against EPA for its refusal to produce records regarding Administrator Scott Pruitt’s public speeches. *See* Press Release, EIP, *EPA Administrator Pruitt’s Secrecy Extends Even to Refusal to Release His Public Speeches* (Dec. 4, 2017), <http://www.environmentalintegrity.org/news/pruitts-public-speeches/>. EIP posted a copy of its complaint to its website, along with a press release in which EIP

explained that such public speeches are typically available to the public via EPA's website, but that EPA had recently broken from this tradition of transparency. EIP publicly listed the dates and locations of and organizations to which Administrator Pruitt delivered the speeches. *Id.*

- On May 11, 2017, EIP sent a letter to EPA's Office of Inspector General, requesting that the Office investigate Administrator Pruitt's reassignment of ten criminal enforcement agents to his security detail. *See* Letter from Eric Schaeffer, EIP, to Office of Inspector General, EPA (May 11, 2017), *available at* <http://www.environmentalintegrity.org/wp-content/uploads/2017/05/Letter-to-EPA-IG-from-EIP.pdf>. EIP based this letter on EPA budget documents that the Washington Post had obtained. EIP posted the letter to its website along with a press release in which it further publicized the EPA budget documents and their implications. *See* Press Release, EIP, *EIP Demands Investigation of EPA Administrator Scott Pruitt's Huge Security Detail* (May 11, 2017), <http://www.environmentalintegrity.org/news/eip-demands-investigation-of-epa-administrator-pruitts-huge-security-detail/>.

As to factor (1)(2)(iv), this is a variation on factor (1)(2)(iii)—focusing on the significance of the contribution to public understanding rather than on the public understanding itself—and therefore necessarily involves consideration as to the requester's dissemination and expertise. As a result, the information EIP has provided regarding factor (1)(2)(iii) as to EIP's history and means of dissemination are applicable.

Additionally, it is clear that there is currently very little public transparency or understanding as to EPA's communications with the regulated industry, including GenOn, regarding the Steam Electric ELG Rule, as such records are not available to the public. EIP intends to improve this public understanding by learning more from the information requested and subsequently making this information and EIP's expert analysis of the information available to the public.

## **II. Obtaining the information is of no commercial interest to EIP**

As to FOIA's second prong for fee waivers—disclosure of the information “is not primarily in the commercial interest of the requester”—EPA regulations set out two factors for the agency to consider. 40 C.F.R. § 2.107(l)(3). EIP clearly meets both of these factors.

As to factor (1)(3)(i), EPA considers **“Whether the requester has a commercial interest that would be furthered by the requested disclosure.”** 40 C.F.R. § 2.107(l)(3)(i). As a 501(c)(3) non-profit organization, EIP has no commercial, trade, or profit interest in the material requested. EIP will not be paid for or receive other commercial benefits from the publication or dissemination of the information requested.

Under factor (1)(3)(ii), EPA considers the requester's primary interest in the disclosure: **“Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is ‘primarily in the commercial interest of the requester.’”** 40 C.F.R. § 2.107(l)(3)(ii). EIP's primary interest is a

public interest: in analyzing and assessing EPA's communications with third parties and previous travel expenditures and informing the public as to the activities and operations of government. Furthermore, it is clear from EIP's explanation as to the public understanding factors that there is a great deal of public interest in obtaining, analyzing, and disseminating this information.

### **III. Conclusion**

For the reasons set out in EIP's FOIA request and this fee waiver request, EIP has clearly met FOIA's requirements as to fee waivers and the six factors EPA has set out to consider these requirements. *See* 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l). EIP is therefore entitled to a waiver of fees for its FOIA request and respectfully requests that EPA grant such a waiver.